1118.

SUPREME COURT OF THE UNITED STATES.

No. 89.

THE UNITED STATES, COMPLAINANTS,

vs.

HEZEKIAH H. GEAR.

ON A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT UNITED STATES FOR ILLINOIS.

INDEX.

	Original.	Print.
Bill in chancery	1	2
Papers marked A, annexed to and referred to in bill	7	6
Notice to miners, &c.	8	7
Regulations for miners	8	7
Agreement of miners	10	8
Affidavit of defendant	11	9
Adjourned questions	11	9
Clerk's certificate	12	10

J. & G. S. Gideon, printers.

Pleas before the honorable the judges of the circuit court of the United States, for the district of Illinois, at the June term of said court, and on the 14th day of said term, in the year of our Lord one thousand eight hundred and forty-three, and of our independence the 67th.

Present, honorable John McLean, presiding judge, honorable Nathaniel Pope, judge.

THE UNITED STATES OF AMERICA, vs. HEZEKIAH H. GEAR. } Bill for injunction.

This was a bill in chancery, upon which the United States, by their attorney, made application to the court for the allowance of a writ of injunction, to restrain the defendant from digging up and carrying away the mineral lead ore, from lead mines situated upon the lands of the United States described in said bill, which said bill is as follows, viz:

"To the judges of the circuit court of the United States for the district of Illinois, in chancery.

"The United States of America bring this their bill of complaint, against Hezekiah H. Gear, defendant, who resides in the county of Jo Daviess, in the State of Illinois, in the district aforesaid, and hereupon your orators complain and say, that before and at the time of the committing of the grievances by the said defendant as hereafter mentioned, the said complainants were, and ever since have been, and still are, seized in their own right in fee of the following tracts, pieces or parcels of land situate in the State, county, and district aforesaid, and known and described as follows: the north half of section twenty-three (23), township twenty-nine (29) north, range one (1) east, of the fourth principal meridian; also the south half of fractional section eight (8), township twenty-eight (28) north, of range one (1) east, of the fourth principal meridian, and the said complainants ever since they have been seized of the said lands aforesaid, have been and still are the true and lawful owners of all mines and minerals situated in and upon the said lands, and are lawfully entitled to the rights, privileges and appurtenances, to the said lands belonging, or in any wise appertaining. And the said complainants further show, that the said tracts of land are mineral lands, containing large and valuable lead mines belonging to the said complainants, and it has been publicly *know* that *known* lead mines have been situated thereon for at least five years last past; and the said tracts of land have been and still are in pursuance of law reserved from sale as mineral lands, and are not subject

to be entered or purchased under or by virtue of any of the laws of the United States, in relation to the sales of public lands.

And the said complainants further show, that the said Hezekiah H. Gear, for some time, to wit, for the period of at least three years past, has been and still is, digging up and carrying away from the lead mines upon the said tracts of land, large quantities of lead ore of great value, and without any right or authority whatever, and in defiance of the complainants, has dug up and carried away from the said tracts of land so belonging to them as aforesaid, several millions of pounds of mineral lead ore, to the great damage and irreparable injury of the said complainants, and of the said lands. And although the said complainants, by their officers and lawful agents, have frequently and in an amicable manner, requested the said defendant to refrain and desist from committing any further waste and spoliation upon the said lands and property of the said complainants, yet the said defendant has absolutely refused, and still does refuse, to comply with such reasonable request, but continues digging up and carrying away mineral lead ore from the said mines, upon the said tracts of lands, and threatens and gives out, that he will, in defiance of the said complainants, continue to dig and carry away the mineral lead ore from the said lands, and make no compensation to the said complainants therefor; for reason whereof the said defendant at some time alleges and pretends, that he has a permit from the complainants to enter upon any of their mineral lands and to dig lead ore, and at other times, that the said lands are not legally reserved as mineral lands, and are subject to be entered, held, and purchased under some of the laws of Congress, giving settlers upon the public lands a right to purchase the same by pre-emption; whereas the complainants charge the truth to be, that the said tracts of land are legally reserved from sale as mineral lands, as appears by papers hereunto annexed, marked A; and whereas in truth and in fact the said lands being so reserved as aforesaid, are not subject to be entered, held, or purchased, under or by virtue of any act of Congress in relation to the sale of the public lands. And the said complainants further say, that they have reason to believe, and do believe, that the said defendant has not now, nor has he had since the year one thousand eight hundred and thirty-five, any lawful subsisting permit from and under the authority of the complainants, authorizing him to dig lead ore upon the said tracts of land or either of them.

And the said complainants further show, that on or about the 5th day of June, in the year 1826, the complainants by their officers or agents, established certain regulations for miners at the United States mines, on the upper Mississippi, which description includes the said two tracts of land aforesaid, as by reference to the said rules and regulations, a copy whereof is hereunto annexed, signed by the defendant, and ready to be produced by the said complainants, will more fully and at large appear.

And the said complainants further show that they are ignorant of, and cannot state, whether the said defendant did receive, any permit to mine in pursuance of the said regulation; but if he did receive any permit, by or under the authority of the claimants, to mine upon the said lands, the said permit was granted under and in pursuance of the said regulations, and, for a long time past, has been, and is, forfeited and null and void, and of no effect, in consequence of the defendant's having violated the provisions of the said regulations, in having wholly neglected to make his report to the agent (the superintendant of the lead mines, or agent of the complainant's meaning) of the name of the smelter to whom he delivered his mineral, and the amount he delivered in each quarter, in pursuance of the eleventh article of the said regulations, and in consequence of the said defendant having, in all respects, disobeyed and violated the said regulations, and also in consequence of more than five years having elapsed since the date of any such permit.

And the said complainants further show, that all permits for mining upon the said complainants' lands, which had been issued under and in pursuance of the said regulations, were, on or about the 30th day of April, 1842, declared, by a notice issued by the agent of the said complainants, John Flannagan, the superintendent of the United States lead mines, to be revoked, and that they would become null and void at the expiration of three months from the day last aforesaid; which said notice was published from the day aforesaid to the first day of January, 1843, and in a weekly newspaper published at Galena, in the county aforesaid, called "the Galena Gazette and Advertiser," which said paper was, during the time aforesaid, taken by the said defendant; and has also been published from the date of said notice to the present time in another weekly newspaper published at Galena aforesaid, called the "Galena Sentinel"—a copy of said notice is hereunto annexed, marked C, which the complainants pray may be taken as part of this bill; and the said complainants say that the said defendant at and about the time of the first publication of the said notice as aforesaid, had full knowledge and notice of the same; that he conversed with John Flannagan, the said superintendent, upon the subject of the said notice, and declared that he would pay no attention to the said notice; that he would recognise no rights of complainants over the mineral lands, and would pay no rents to the Government for mining upon the Government lands; and the complainants further say that the said defendant is a naked trespasser, without any subsisting license or authority whatever, and in violation of law, and in open and declared defiance of the said complainants, continues committing waste and depredation upon the said complainants' said tracts of lands, and doing irreparable injury to the same in digging up from and out of the lead mines, situated upon the said lands, large quantities of valuable lead ore, and carrying the same away, and converting the same to his own

use, to the great damage of the said complainants, to wit, to their daily damage of twenty dollars, or thereabouts; all which actings and doing are contrary to equity and good conscience, and tend to the manifest injury of the complainants in the premises; in consideration whereof, and forasmuch as the complainants can only have adequate relief in a court of equity, where matters of this nature are properly cognizable and relievable—to the end, therefore, that the said defendant may, if he can show why you orators should not have the relief hereby prayed, and may, upon his corporal oath, and according to the best of his knowledge, remembrance, information, and belief, full, true, direct and perfect answer make, to such of the several interrogatories hereinafter numbered and set forth, as, by the note hereunder written, he is required to answer; that is to say:

1st. Whether there are not lead mines of lead mineral ore in and upon the said two tracts of land in this bill described, to wit, the north half of section 23, township 29 north, of range 1 east, of the fourth principal meridian; also the south half of fractional section eight (8), township 28 north, of range 1 east, of the fourth principal meridian, or in and upon either of said tracts of land; and if so, which, and how many of said mines have been opened, discovered or worked upon the said tracts of land; and state, as nearly as you can, how long since said mines were discovered?

2d. Whether the said defendant by himself, his agents, servants, or tenants, or workman, have been, for some time past, digging up and carrying away the lead ore from said tracts of land; and if yea, are not he and they still digging or mining and carrying away the said mineral from the said mines upon the said tracts of land or either of them; and if not now working the said mines upon the said lands, how recently, or up to what time, have he or they worked the said mines, or raised mineral lead ore, from the said mines, and carried the same away? And that the said defendant may be restrained and enjoined by this honorable court from digging up *and* and carrying away the mineral lead ore from the said tracts of land, or either of them, and from mining upon the said tracts of land or either of them; and that your orators may have such further or other relief in the premises as the nature of the case requires, and as to your honors shall seem meet, may it please your honors to grant unto your orators a writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said Hezekiah H. Gear, his servants, workman, tenants and agents, to restrain him, his servants, workman, tenants and agents, from digging up and carrying away the mineral lead ore from and off the said two tracts of land described in this bill, as the north half of section 23, township 29 north, of range 1 east, of the 4th principal meridian; and also the south half of fractional section 8, in township 29 north, of range 1 east, of the 4th principal meridian, and from working in any way the lead mines upon the said tracts of

land, and from committing any waste or spoil upon the said tracts of land, and also to grant unto your orators a writ of subpœna to be issued out of and under the seal of this court, to be directed to the said Hezekiah H. Gear, commanding him, at a certain day, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises aforesaid, and to stand to, perform, and abide by, such order, direction and decision therein, as to your honors shall seem meet; and your orators shall ever pray, &c.

"J. BUTTERFIELD, *U. S. Att'y.*"

The defendant, Hezekiah H. Gear, is required to answer the interrogatories numbered respectively 1 and 2.

DISTRICT of ILLINOIS, *ss.*

John Flannegan, superintendent of the lead mines of the United States, being duly sworn, saith that he has read the foregoing bill of complaint, and that he believes the matters and things set forth therein are true.

Sworn to, and subscribed John Flannagan, in open court, this 7th June, 1843.

JAS. F. OWING,
Clk. U. S. C. C. D. I.

The following are copies of the papers annexed to and referred to in the foregoing bill, namely:

	Sec.	Town.	Range.			Remarks.
A, the E. half	10.	28.	1	E. of 4th	P. M.	The N. E. qr. marked on plat as mineral.
" E. half	15.	28.	1	"	"	No mark of mineral on plat.
" N. half fr.	17.	28.	1	"	"	Marked on plat as mineral.
" S. half	8.	28.	1	"	"	Marked on plat as mineral.
" N. half	23.	29.	1	"	"	Marked on plat as mineral.
" E. half	15.	29.	2	"	"	Not marked as mineral.
" S. W. qr.	22.	29.	2	"	"	Marked on plat as mineral.
" N. W. qr.	27.	29.	2	"	"	Marked on plat as mineral.
" N. W. qr.	7.	27.	3	"	"	Plat not in this office.
" S. E. fr. qr.	24.	28.	1	west	"	Not marked as mineral.
" W. half fr.	13.	29.	1	"	"	Not marked as mineral.
" S. W. qr.	24.	29.	1	"	"	Not marked as mineral.

I, John Hogan, register of the land office at Dixon, Illinois, do certify that the above list of lands is embraced in the district of lands subject to sale at Dixon, Illinois; also, that they are situated in the district reserved as mineral land, and that the remarks appended indicate whether there is evidence on the plats of there being mineral; those marked as mineral, pre-emption proofs would not be admitted to in accordance with the instructions of the Commissioner General [of the] Land Office of Aug. 18th, 1841, and 22d Oct., 1841.

Given under my hand this 29th day of May, 1843.

JOHN HOGAN, *Register.*

Notice.

OFFICE UNITED STATES LEAD MINES,
Galena, Ill., April 30th, 1842.

Notice is hereby given to all persons mining or occupying mineral lands that the undersigned is now prepared to grant lease for the lead mines of the United States, in the State of Illinois, and the two Territories, Wisconsan and Iowa, under the late regulation from the War Department. In all applications for leases, preference will be given to old and present mining occupants; and they are requested to make immediate application to the superintendent for leases, and at the same time render and exhibit a statement of all the rent due by them. In any case where the present claimant or occupant shall refuse to take out a lease, and comply with the late regulations of this office, the same will be leased to the first applicant. Notice is further given, that all the permits for mining in Government lands, which were granted by the late superintendent, Doctor H. King, or any previous superintendent, are hereby revoked, and will become null and void at the expiration of three months from this date, as provided for in said permits; the holders of permits who have locations agreeably to the regulations under which they were granted, and who shall come forward within the above mentioned time, and pay the arrearages of rent due to the United States, will receive leases for mining on such locations according to the late instructions of the War office on that subject.

JOHN FLANNAGAN,
Supt. "U. S. Lead Mines."

I hereby certify that the advertisement hereunto annexed was published for three months successively, in the North Western Gazette and Galena Advertiser, the first of which publication was on the 30th day of April, A. D. 1842.

H. H. HOUGHTON,
Ed. & Pub. said paper.

Regulations for miners at the U. S. mines on the Upper Mississippi.

First. All the miners shall forthwith report themselves to the agent, who will enter their names on a register, and give them a written permit to mine on ground which is not leased.

Second. Without such written permit, no miner shall dig or mine; he shall forfeit his discovery and all mineral he digs, and be prosecuted as a trespasser.

Third. Any miner who gives false testimony in any dispute or arbitration, or before any magistrate, or who is convicted of stealing ore or any other thing, setting fire to the prairie or woods, cutting timber where it is prohibited, shall forfeit his permit to mine or dig, and no smelter shall purchase his ore or give him any employment.

Fourth. When going to dig, two or [more] miners must work in company; they are permitted to stake off three hundred yards square lines, to be north and south and east and west.

Fifth. A permanent post or stake must be placed near every digging, with marks designating ownership.

Sixth. A discontinuance of work for eight days in succession shall cause a forfeiture of ground.

Seventh. When a dispute shall arise respecting the right to ground, the matter shall be arbitrated among miners or smelters; on their failing to settle it, a reference to the agent, whose decision shall be final.

Eighth. No person is permitted to build a cabin, cultivate land, cut timber, or settle in any manner, without written permission of the agent.

Ninth. Whenever surveys of discovery lots be required, they will be surveyed 40 by 20 rods, running to cardinal points, the length to correspond with the course of the lead, and the discoverer will be entitled to a certificate of survey. The first clause of the ninth article of the former regulations relative to guaranties is superseded by regulation of the 5th June, 1826, the substance of which is contained in the subjoined supplement.

Tenth. No miner shall hold two discoveries at the same time, nor shall any miner be permitted to go on other ground until his lead is dug out or sold, or until he abandons it, and renders up his certificate of survey.

Eleventh. All miners must report to the agent the name of the smelter to whom they deliver their mineral, and the amount they deliver in each quarter.

Twelfth. No certificate of survey shall be sold or transferred to any other than a miner who has written permit, or to a smelter who has a license; and no survey or other digging shall remain unwrought for more than eight days in succession, on penalty of forfeiture.

Thirteenth. Any mineral raised when searching for discoveries or leads must be delivered to a licensed smelter, and to no other person.

Fourteenth. Any miner who shall disobey or go contrary to any of these regulations, shall forfeit his permit to dig or mine; and should he attempt to cut timber, mine, farm, cultivate land, or build cabins, without written permission of the agent, he will be prosecuted as a trespasser on the United States land.

W. THOMAS, *Lt. U. S. army,*
Supt. U. S. lead mines.

FEVER RIVER, *June 5th*, 1826.

1st. We, the subscribers, do voluntarily agree to deliver at least once a month to a licensed smelter all lead ore which may come into our possession at the U. S. lead mines, upon receiving three

hundred and fifty pounds of pure lead, or an equivalent in money, for each thousand pounds of clear ore, to be paid within twenty-five days from the date of delivery of the ore at the diggings.

2d. We agree not to deliver any lead ore to any other person than a licensed smelter, and not to deliver ore to one smelter when we are indebted to another, without the consent of such creditor.

3d. We further agree that we will forfeit to the United States all our right, claim, or interest to any lead ore which we may have, or to any discovery of lead, or to any lot or piece of ground, upon proof of our having violated either of the above regulations.

LEAD MINE OFFICE, *Fever River, June 5th*, 1826.

The defendant appeared upon the hearing of the motion, and filed his affidavit in opposition, namely: "Personally appeared before me, James F. Owings, clerk of said court, Hezekiah H. Gear, who being duly sworn according to law, says, that in the year eighteen hundred and twenty-seven, he entered upon the following described tract of land, to wit: the north half of section twenty-three, (23,) township twenty-nine (29) north, of range one east, of the fourth principal meridian; that he erected a house upon said tract of land; that he has opened a farm upon the same, and that he has continued to cultivate and occupy said land from the year aforesaid up to the present time. H. H. GEAR."

Sworn to and subscribed before me, in open court, this 9th day of June, A. D. 1843.

JAMES F. OWINGS, *Clerk*.

And the motion having been argued before the court by the counsel of the respective parties, the opinions of the judges were opposed upon the following points:

1st. Whether the act of Congress, entitled "an act to create additional land districts in the States of Illinois, Missouri, and the territory north of the State of Illinois," approved June 26, 1834, so far repeals the 5th section of the act of the 3d of March, 1807, entitled "an act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," as to subject the lands mentioned in said act of June 26th, 1834, containing lead mines, to be entered and purchased by pre-emption, under any of the pre-emption laws of Congress.

2d. Whether the said act of 1834 requires the President of the United States to cause lands containing lead mines to be sold, or only authorizes him to do so in his discretion.

3d. Whether lands containing lead mines are subject to be held or purchased under any of the acts of Congress granting the rights of pre-emption to settlers upon the public lands.

4th. Whether the digging lead ore from the lead mines upon the